speech" so broadly that future plaintiffs will find it virtually impossible to demonstrate that government-directed use of their funds to finance speech violates their First Amendment rights. That interpretation of the government speech defense is impossible to square with Thomas Jefferson's admonition, frequently cited approvingly by the Court, that "'to compel a man to furnish contributions of money for the propagation of opinions he disbelieves is sinful and tyrannical.'" *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 234 n.31 (quoting I. Brant, *James Madison: The Nationalist* 354 (1948)). Review is warranted to determine whether, as the Ninth Circuit determined, the government speech defense ought to be read so broadly as to nullify decades of compelled speech case law.

The Ninth Circuit's startling interpretation of *Johanns* is far from self-evident. *Johanns* vacated a judgment that had affirmed a *facial* challenge to a federal law that compelled beef producers to contribute to a fund used to promote beef sales, explaining that "compelled funding of government speech *does not alone* raise First Amendment concerns." *Johanns*, 125 S. Ct. at 2062 (emphasis added). The Court nonetheless made clear that such compelled funding could under certain circumstances – for example, if the speech is "attributed to someone other than the government," *id.* at 2064 – give rise to *as applied* First Amendment challenges to the funding scheme. *Id.* at 2065. Yet, by granting California's motion to dismiss Petitioners' as-applied challenge for failure to state a claim, the courts below have granted governments free rein to compel funding of virtually any speech, no matter how strongly the contributor may object and no matter that the contributor objects that at least a portion of the speech is being directly attributed to him. Apparently, all a government need do to achieve this result, at least according to the Ninth Circuit, is to ensure that the funds at some point pass through government hands.

Nothing in the Court's case law compels such a result. Indeed, there is a strong argument to be made that a law compelling private speakers to support and associate themselves with government speech should be subject to *stricter* constitutional scrutiny than one that compels them to support private speech. No value is more central to the First Amendment doctrine – one could fairly describe it as the reason we *have* the First Amendment – than the freedom of private speakers to *disassociate* themselves from the government.

The Court recognized in *Keller v. State Bar of California*, 496 U.S. 1, 12-13 (1990), that some sort of government speech defense is appropriate because "government officials are expected as a part of the government process to espouse the views of the majority of their constituents," and is necessary to prevent dissenting citizens from invoking the compelled speech doctrine to *silence* the government. But nothing in *Keller* or *Johanns* endorses the Ninth Circuit's holding that – contrary to Thomas Jefferson's admonition – there are virtually *no* First Amendment limitations on the government's authority to compel private individuals to support and be associated with its speech. Review is warranted to determine whether the compelled speech doctrine has been eviscerated to such an extent.

Review is also warranted because the decision below has led to sharp conflicts among federal judges. Judge Trott's dissenting opinion in this case eloquently lays out the serious constitutional concerns implicated when, as here, private entities are forced to finance advertisements that accuse them of being liars and killers. That compelled funding of such vicious speech has been upheld by the lower courts is likely a testament to the extreme unpopularity of the tobacco industry. WLF ventures to guess that courts would not tolerate similar

mistreatment of, for example, abortion providers. Indeed, a federal district court in Alabama invoked Judge Trott's reasoning to strike down government efforts to compel abortion clinics to provide financial support to the government's anti-abortion speech – under circumstances factually indistinguishable from this case in all material respects. *Summit Medical Center of Alabama, Inc. v. Riley*, 284 F. Supp. 2d 1350, 1362 (M.D. Ala. 2003). Review is warranted to resolve that conflict and to determine whether members of disfavored industries are entitled to the same First Amendment rights as are all other Americans.

I. REVIEW IS WARRANTED TO DETERMINE WHETHER THE APPEALS COURT CORRECTLY READ *JOHANNS* AS NULLIFYING DECADES OF COMPELLED SPEECH CASE LAW

The Court has frequently cited with approval Thomas Jefferson's admonition that "'to compel a man to furnish contributions of money for the propagation of opinions he disbelieves is sinful and tyrannical.'" *See, e.g., Abood v. Detroit Bd. of Education*, 431 U.S. 209, 234 n.31 (quoting I. Brant, *James Madison: The Nationalist* 354 (1948)). The Court has demonstrated its faithfulness to Jefferson by declaring that the First Amendment compelled speech doctrine extends not only to forcing individual citizens to utter or display the government's message, *e.g. Wooley v. Maynard*, 430 U.S. 705, 713-15 (1977) (display of state motto, "Live Free or Die" on automobile license plate); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 642 (1943) (recitation of Pledge of Allegiance), but also to forcing individuals to provide financial support for speech to which one objects. *See, e.g., Abood* and *Keller*.

Yet, little remains of the compelled speech doctrine if the Ninth Circuit's understanding of the government speech defense (as articulated in *Johanns*) is correct. According to the Ninth Circuit, any speech paid for with funds belonging to (or transferred from) the government is "government speech" that is exempt from First Amendment compelled speech constraints. Pet. App. 15a-19a. If that were true, any government could avoid all those pesky compelled speech cases simply by redirecting the flow of funds. For example, governments seeking to avoid First Amendment challenges to expenditures by State bars could require lawyers to pay bar dues directly to the State government (rather than to quasi-government bar associations) and then pass the fees along to the bar associations. City governments could require their non-union employees to pay fees directly to the city (rather than to labor unions) and then pass the fees on to the labor union. When the U.S. Supreme Court invoked the First Amendment to bar compelled speech in each of those situations, it is highly unlikely that the Court contemplated that governments could so easily avoid First Amendment strictures by redirecting the flow of funds; the tyrannical nature of compelled contributions to the propagation of opinions one disbelieves is not dissipated simply because the government has slapped its imprimatur on the speech.

Moreover, the danger of the Ninth Circuit's approach is not limited to cases involving compelled *financial* support of objected-to speech. If placing the government's imprimatur on speech is sufficient to invoke the "government speech" defense, then little remains of *Wooley*'s prohibition against requiring motorists to display the State's motto. After all, few if any passers-by would think that the motorist's display of the State motto connotes support for the message, and the motorist could eliminate any possibility of confusion by displaying his own sign disclaiming any support. Yet under the Ninth

Circuit's approach to the government speech defense (which denied Petitioners' effort to introduce factual evidence in support of an as-applied challenge), California could require its citizens to display a wide-variety of State-sponsored messages. Review is warranted to determine whether the Ninth Circuit's correctly read *Johanns* as adopting such a broad understanding of the government speech defense.

A. The Decision Below Sanctions Dismissal of As-Applied Compelled Speech Challenges Without Regard to the Strength of the Dissenter's Objection and to Claims That the Speech Is Being Attributed to Him

The contrast between the factual and legal postures of this case and *Johanns* could not be more striking. By reflexively applying *Johanns*'s government speech defense in a markedly different setting the Ninth Circuit has threatened serious erosion of First Amendment rights.

First, *Johanns* came to the court after a full trial, while this case came to the Ninth Circuit on appeal from a grant of California's motion to dismiss for failure to state a claim. Thus, although *Johanns* recognized that the First Amendment may prohibit the federal government from running "buy beef" advertisements claiming that dissenting beef producers support the advertisements, it held that the evidence at trial was insufficient to support a *facial* First Amendment challenge to the Beef Promotion and Research Act of 1985, 99 Stat. 1597, because the Act did not *require* that advertisements include such claims. *Johanns*, 125 S. Ct. at 2064-65. In contrast, the Ninth Circuit affirmed dismissal of Petitioners' *as-applied* challenge and refused to allow them to introduce evidence to demonstrate that statements in the advertisements were being attributed to Petitioners. Although conceding that the

advertisements included statements attributed to cigarette industry executives – statements that placed the industry in an extremely negative light – the Ninth Circuit insisted that the statements were insufficient to state a compelled speech claim because they were "unmistakable satire" and could not have been understood by a "reasonable viewer" to represent the views of "actual tobacco executives." Pet. App. 30a. Under that extremely broad view of the government speech defense, Mr. Maynard could not have prevailed in his First Amendment challenge to the New Hampshire requirement that he display automobile license plates bearing the State motto, because no one contended that passing motorists inferred from that display that Mr. Maynard subscribed to the State motto.[3] By invoking *Johanns* at the pleadings stage to dismiss an as-applied challenge, the Ninth Circuit expanded the scope of the government speech defense far beyond anything contemplated by this Court.

Second, as Judge Trott recognized in dissent, there is a difference "not just . . . of degree, but of material kind" between the compelled speech at issue here and compelling agricultural producers to provide funding for advertisements promoting their products on a generic basis. Pet. App. 47a. WLF recognizes that some agricultural producers believe that their products are superior in quality to products of like kind being offered in the marketplace and thus do not approve of advertisements that promote their products on a generic basis.

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[3] Moreover, it is bewildering for the Ninth Circuit to suggest that "[n]o reasonable viewer" would believe that the words attributed to cigarette industry executives had actually been spoken by industry executives. Given that the vilification campaign regularly accuses industry executives of being liars and killers, it is not only possible but highly probable that many viewers believed that industry executives had spoken the words in question.

But as the Court has recognized, such generic advertising nonetheless provides some benefits to all producers, including dissenters. Thus, the Court has recognized that such objections to generic advertising are largely "trivial" and in any event are not "comparable to those [cases] in which an objection rested on political or ideological disagreement with the content of the message." *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471, 472 (1997). In contrast, the compelled speech to which Petitioners object is, as Judge Trott recognized, "deliberately destructive of those forced to pay for it." Pet. App. 47a. California is forcing Reynolds, Lorillard, and the remainder of the cigarette industry to pay into a special fund, and then is using that fund to pay for speech accusing them of a wide range of criminal and unethical behavior. WLF cannot imagine speech that an individual could have greater objection to being forced to fund, yet the Ninth Circuit deemed the subject matter of the compelled speech totally irrelevant in determining that the government speech doctrine barred all First Amendment claims. Review is warranted to determine whether this Court intended the government speech defense to apply so broadly.

B. The Court Has Construed The Government Speech Doctrine As Necessary To Ensure Governments' Ability To Participate in Debate, Not To Grant Government The Power To Force Citizens To Associate With Speech With Which They Disagree

Review is also warranted because the decision below was based on a fundamental misunderstanding of the government speech defense.

The rationale underlying that defense was perhaps best expressed in *Keller*. The Court explained that "government speech" needs to be excepted from the compelled speech

doctrine to ensure that dissenting citizens cannot invoke the compelled speech doctrine to silence the government altogether:

> Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making government decisions were not free to speak for themselves in the process. If every citizen were to have a right to insist that no one paid with public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

Keller, 496 U.S. at 12-13.[4]

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[4] The Court ultimately concluded that the State Bar of California was not an entity qualified to invoke the "government speech" defense because it had "special characteristics" that set it apart from a more typical government agency. *Id.* at 12. Among those characteristics were: (1) its principal funding source was membership dues, rather than appropriations made to it by the legislature; and (2) all California lawyers were required to be members, and they were the only members. *Id.* at 11. Because of that conclusion, the Court did not need to address directly the State Bar's "government speech" defense. *Id.* at 13. Notably, the Court arrived at its conclusion despite California's determination, as a matter of State law, that the State Bar was a "governmental agency." Indeed, the State Bar's status as an arm of the government was not open to serious dispute – after all, the plaintiffs could not have alleged that the State Bar violated the First Amendment and could not have invoked the jurisdiction of this Court in the absence of an allegation that the State Bar was acting under color of State law.

Keller's rationale for excepting "government speech" from the compelled speech doctrine strongly suggests that the government speech defense is inapplicable to this case. Reynolds and Lorillard do not contend that the First Amendment bars DHS from continuing with its vilification campaign; rather, they contend merely that DHS should not be permitted to continue the vilification campaign with money raised solely from the tobacco industry. Thus, this suit does not threaten DHS's ability to speak out at all. If this suit is successful, DHS could nonetheless continue its vilification campaign so long as it could persuade the legislature to appropriate sufficient funds to it from the California general treasury. In the absence of any threat to California's ability to speak out as it chooses on tobacco-related issues, there is no reason to abandon otherwise-applicable constitutional restraints on compelled speech simply because the recipient of the compelled funding is the government itself. Certainly, there is no basis for asserting that the odiousness of "compel[ling] a man to furnish contributions of money for the propagation of opinions which he disbelieves" is in any way reduced simply because the speaker is the government.

Indeed, there is a strong argument to be made that a law compelling private speakers to support and associate themselves with government speech should be subject to *stricter* constitutional scrutiny than one that compels them to support private speech. No value is more central to the First Amendment doctrine – one could fairly describe it as the reason we *have* the First Amendment – than the freedom of private speakers to *disassociate* themselves from the government. It most certainly protects against the government's ability to compel private citizens to provide affirmative support for the government's message – whether that support takes the firm of speaking a pledge (*Barnette*), displaying a State motto on a automobile license plate

(*Wooley*), signing an oath (*Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 447-49 (1974), or, as here, contributing money.

Far from suggesting that *Keller* is no longer good law, *Johanns* cites repeatedly to *Keller* in support of its understanding of the scope of the government speech defense. Accordingly, *Johanns* cannot be understood as granting governments unlimited authority, so long as funds pass through the government's hands at some stage of the process, to finance ideological speech using funds readily identifiable as having originated with individuals who object to the speech. What California is doing in this case is the First Amendment equivalent of the executioner who requires a condemned man to dig his own grave and to load the bullet before being shot. WLF respectfully suggests that many others besides Thomas Jefferson find such government conduct sinful and tyrannical,[5] and that *Johanns* should not be deemed to condone such conduct.

As noted above, *Keller*'s rejection of California's government speech defense (to a compelled speech challenge to State Bar spending) was not based on a finding that the State Bar was, in any sense, a private entity. Rather, *Keller* recognized that even though the State Bar was created and controlled by the State government, the government speech defense was inapplicable because of the special circumstances surrounding payments into the State Bar – in particular, the very small number of people paying funds into the State Bar meant that individual bar members could be readily identifiable as the funders of objected-to speech. Review is

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[5] Judge Trott, in his dissent, refers to the vilification program as "the ultimate cheap shot." Pet. App. 43a.

warranted in this case to determine whether (as the Ninth Circuit held) the government speech doctrine eliminates all First Amendment compelled speech concerns the moment funds pass into government hands; or whether (as Petitioners contend) there are limits on the scope of the government speech defense, and whether factors all present in this case such as the highly ideological nature of the speech, the ready identifiability of the funding as having come from the objectors, and the government's attribution of the speech to the objectors – are relevant in determining whether those limitations apply.

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW HAS LED TO SHARP CONFLICTS WITHIN THE FEDERAL JUDICIARY

Johanns marked the first time that the Court invoked the government speech doctrine to reject a First Amendment challenge to compelled speech. As the divided decision below and other federal court decisions well illustrate, *Johanns* leaves unanswered many questions regarding the scope of the government speech doctrine. Review is warranted to resolve those questions, which have divided the lower federal courts.

As noted above, the Ninth Circuit panel hearing this case split 2-1, with Judge Trott disagreeing with the majority's determination that the government speech defense required dismissal of Petitioners' claims on the pleadings. Importantly, that split remained even after the parties filed supplemental briefs regarding the impact of *Johanns*.

The majority and dissent disagreed on virtually every relevant issue. The majority stated that "the *Johanns* opinion affirms our reasoning." Pet. App. 29a. Disagreeing with that

assessment, Judge Trott would have held: (1) the applicability of the government speech should not depend on the regulatory framework employed by the government in compelling speech, *id.* 36a; (2) the compelled funding scheme could not withstand constitutional scrutiny under the traditional "germaneness" test mandated by *Abood*, *id.* 42a; (3) there are few if any democratic checks on the vilification program, because only Petitioners and other participants in the tobacco industry – not taxpayers as a whole – must pay for the program, and therefore a First Amendment challenge is permissible, *id.* 43a; (4) Petitioners ought to have an opportunity to introduce evidence to demonstrate that the advertisements "coercively associate" them with the advertisements' anti-industry statements, *id.* 46a; and (5) *Johanns* is distinguishable because, unlike in *Johanns*, "the purpose of the compelled speech is deliberately destructive of those forced to pay for it." *Id.* 47a.

A federal district court in Alabama recently issued a decision that directly conflicts with the Ninth Circuit decision, and in the process criticized the district court decision upholding California's vilification program. *Summit Medical Center of Alabama, Inc. v. Riley*, 284 F. Supp. 2d 1350, 1361 (M.D. Ala. 2003). *Summit* involved a challenge to an Alabama statute that required abortion providers to purchase health information pamphlets from the State and distribute them to all patients seeking an abortion. Although the plaintiffs objected to being required to distribute the pamphlets, the court upheld that requirement on the ground that Alabama "has a significant interest in regulating the health and welfare of its citizens." *Id.* at 1362. However, the court struck down on First Amendment compelled speech grounds the provision that required abortion providers to pay the cost of producing the pamphlets to which they objected; the court held that to require such funding would too closely associate the plaintiffs with the speech to which they objected. *Id.* The

court explained, "'[W]here the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with the group, the government has directly focused its coercive power for expressive purposes.'" *Id.* at 1360 (quoting *United States v. Frame*, 885 F.2d 1119, 1132 (3d Cir. 1989)). The court criticized the district court in this case for reaching a contrary result; it said, "[T]his court departs from its analysis [*i.e.*, the analysis of the *Shewry* district court] because it failed to consider the importance that the government's assessment method has on the First Amendment analysis." *Id.* at 1361.

WLF ventures to guess that the decision below had much to do with the identity of the plaintiffs. Among industries that sell legal products, the cigarette industry is perhaps the least popular in this country. There is a natural tendency to overlook violations of constitutional rights when the victims do not easily elicit public sympathy. As the *Summit Medical* decision suggests, courts are far more likely to insist that constitutional rights be respected when those whose rights are being infringed are held in higher public esteem.

But the Bill of Rights does not exist solely for the benefit of the popular. To the contrary, it is those who are scorned by the public who are most likely to endure harsh treatment and who consequently are most in need of judicial protection of their constitutional rights. Review is warranted to ensure that Petitioners are afforded the same constitutional protections that federal courts have afforded to similarly situated individuals facing similar compulsions to fund speech that they find abhorrent.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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